SUPREME COURT, U. S.

MAY 31 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ~~1334~~ 113

UNITED STATES OF AMERICA, - - Petitioner,

versus

HOMER O. CORRELL and
DOROTHY CORRELL, - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MEMORANDUM FOR HOMER O. CORRELL AND DOROTHY CORRELL IN OPPOSITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, - - *Petitioner,*

v.

HOMER O. CORRELL and
DOROTHY CORRELL, - - - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MEMORANDUM FOR HOMER O. CORRELL AND DOROTHY CORRELL IN OPPOSITION.

The question presented in this case is whether the amount of money expended by Homer O. Correll for breakfast and lunch while on the road in pursuit of his business constitutes deductible traveling expenses incurred while away from home in the pursuit of a trade or business within the meaning of 1954 Code Section 162(a)(2) or nondeductible personal or living expenses under Code Section 262.

The facts show that the respondent, Homer O. Correll, lived in Fountain City, Tennessee, which is a suburb of Knoxville. During the years in issue, the

respondent was a traveling salesman for Hale Brothers, Inc., a Tennessee Corporation with principal offices in Morristown, Tennessee, and which had, and still has, as its principal business the distribution of fruits, vegetables, and institutional canned goods and frozen foods throughout East Tennessee, Kentucky and the fringe of Western North Carolina. The respondent's territory covered a portion of East Tennessee and included the cities of Madisonville, Englewood, Etowah, Athens, Sweetwater, Lake City, Caryville, J[illegible]sboro, LaFollette, and Jellico. Since respondent's employer required him to be in his territory at the beginning of a business day, it was necessary for the respondent to arise at 4:30 A.M. in order to drive the necessary distance and still arrive in his territory at the required time. On a typical day the respondent ate breakfast some fifty (50) miles from his home at a restaurant in Sweetwater, Tennessee, which restaurant is also one of the respondent's customers. Thereafter, he would call on customers in his territory until 2:00 P.M. at which time he ate his lunch at a customer's restaurant in Athens, Tennessee, which is approximately seventy-five (75) miles from respondent's home. After lunch the respondent would continue to call on customers until around 4:00 P.M. at which time he would make the return trip home arriving at approximately 5:30 P.M.

As shown above, the respondent was, without question, away from his home town and the Knoxville area in pursuit of his trade or business when he ate both breakfast and lunch.

The respondent takes the position that such meals are deductible, or that any amounts received as reimbursements for such meals are excludable from adjusted gross income, under the provisions of Sections 62 and 162 of the Internal Revenue Code of 1954. The Government contends, on the other hand, that the meals are not deductible and that any amounts received as reimbursements for such meals should be included in respondent's income.

The Government bases its entire case on the theory that before such meals are deductible, the taxpayer must be away from home *overnight*. Note, however, that there is no language in any Code Section which provides that, "while away from home," means, "while away from home 'overnight.'" This is simply an administrative interpretation by the Government which is obviously more in the nature of legislation than interpretation. How easy it would have been for Congress, in drafting the Code Sections under consideration, to have broadened the phrase "while away from home" to "while away from home overnight" if that was the congressional intent.

The Government argues in its petition that this Court should grant the Petition for a Writ of Certiorari because this case is in conflict with the decision of the Court of Appeals for the First Circuit in *Bagley* v. *Commissioner*, decided March 15, 1967. Note, however, that the case under consideration is in accord with *Hanson* v. *Commissioner*, 298 F. 2d 891 (C.A. 8th); *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8th), and also in accord with the Fifth Circuit in the

case of *Williams* v. *Patterson*, 286 F. 2d 333 (C.A. 5th), wherein the Fifth Circuit also agreed that the "overnight" rule is merely an arbitrary line-drawing, having no basis in the statute. Also note that the Tax Court of the United States has also stated that it would no longer follow the overnight rule. *Bagley* v. *Commissioner*, 46 T. C. 176 (1966).

The respondent contends that the Supreme Court should not grant the Petition for a Writ of Certiorari in the instant case since the conflict, if one exists, is not over the interpretation of the law but only over the Government's arbitrary administrative interpretation which has already been rejected by two other courts of appeals and the Tax Court of the United States. Since the law is clear, the Government's appeal for any change in the Code Sections should be to the Congress and not to the United States Supreme Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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